No. 88

SUPREME COURT, U.S.

MAY 16 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

TERMINAL CONSTRUCTION CO., INC. and FROUGE CONSTRUCTION CO., INC.,

Petitioners,

against

METRO INDUSTRIAL PAINTING CORP. and MAX GERBEN, JOAN GERBEN and LEO GERBEN, doing business as GERBEN CONTRACTING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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METRO INDUSTRIAL PAINTING CORP., and MAX GERBEN, JOAN GERBEN, and LEO GERBEN, doing busing as GERBEN CONTRACTING COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (Lumbard, Ch. J., Swan and Moore, Circuit Judges) entered herein on February 16, 1961, which affirmed an order of the District Court of the United States for the Southern District of New York, granting respondents' motion to compel arbitration, pursuant to Section 4 of the United States Arbitration Act (9 U.S.C. Sec. 4), and denying petitioners' cross-motion to stay arbitration and to dismiss the petition.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York (Dawson, J.) is reported at 181 Fed. Supp. 130 and is printed in the Record transmitted herein at pages 35a-42a. The opinion of the Court of Appeals is reported at 287 F. (2) 382, and is printed in the Appendix herein at pages 25-35.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1). The judgment of the Court of Appeals was entered on February 16, 1961.

Questions Presented

1. Under the Supremacy Clause, does Congress have the power and did it intend, when it passed the United States Arbitration Act, to empower federal courts to supersede state substantive law by the fashioning of a separate and distinct "substantive body of federal law", relating *specifically to the interpretation of arbitration clauses* to be applied in diversity-commerce cases under Section 2 of the Act, in determining the *"arbitrability"* of the subject matter of construction contracts containing arbitration clauses?

2. Does the original Congressional purpose in the United States Arbitration Act of removing outmoded judicial hostility to commercial arbitration, fairly encompass or contemplate, under the Supremacy Clause, the *complete pre-emption,* in diversity-commerce cases under Section 2 of the Act, of *all state substantive law* governing all contract questions relating to underlying state-created

rights and obligations involved in state-created causes of action, by empowering federal courts to fashion a "substantive body of federal law" on all such subjects?

3. Is the decision in this case (which applies the doctrine of *Lawrence* v. *Devonshire*, 271 F. (2) 402), in conflict with the pronouncement of this Court in *Erie R. Co.* v. *Tompkins* (1938), 304 U. S. 64, that there is no federal, substantive, general, "common law", and, accordingly did the Second Court of Appeals err in pronouncing that the U.S.A.A. empowers the federal courts, in diversity-commerce cases under Section 2 of the Act, to fashion, to the exclusion of state substantive law, a "substantive body of federal law" in relation to interpretation of *"arbitrability"* of the subject-matter of construction contracts containing arbitration clauses—thus insulating such cases from the thrust of *Erie*?

4. If the U.S.A.A. applies in diversity-commerce cases under Section 2 of the Act, does it also apply in actions in *the state as well as in federal courts* on all substantive issues involving state-created rights and obligations relating to *"arbitrability"* of the disputes under arbitration clauses contained in construction contracts?

5. In diversity cases, under Section 1332(c), 28 U.S.C. (Judiciary Act) involving multi-state construction corporations, is the "principal place of business" of such a corporation to be determined by the place or places where its general operational and production activities are carried on, or the place where its final, corporate policy-making decisions and over-all direction and control, are made?

Statutes Involved

The statutory provisions involved are:

UNITED STATES ARBITRATION ACT,

9 U.S.C. Secs. 1, 2, 3 and 4;

JUDICIARY ACT,

28 U.S.C. Sec. 1332(c).

Statement of the Case

1. Prior to May 26, 1958, Frouge Construction Co., Inc., a Connecticut corporation and Terminal Construction Co., Inc., a New Jersey corporation, both authorized to do business in New York State (and both doing business under the joint-venture name of "Terminal-Frouge"), entered into a contract with the United States of America for the construction of a housing project at the Homestead Air Force Base, Homestead, Florida.

On May 26, 1958, Terminal-Frouge (hereinafter called "Frouge") entered into a subcontract in New York City with Metro Industrial Painting Corp., a New York corporation and Max Gerben, Joan Gerben and Leo Gerben, a copartnership doing business under the name "Gerben Contracting Company", all of whose members are citizens and residents of New York. The sub contractors (hereinafter called "Metro") were to perform certain painting work at the Homestead site. The subcontract contained the arbitration clause in question:

> "Anything to the contrary notwithstanding in this agreement, it is understood that any questions with respect to performance, non-performance, default, compliance or non-compliance, whether on behalf of the Contractor or the Subcontractor, shall be determined by Sidney O. Raphael and David Morgulas jointly.

In the event that the said Sidney O. Raphael and David Morgulas cannot agree as to the aforegoing matters, then and in that event request shall be made of the President of the Bar Association of the City of New York for appointment and/or designation of a third party, who shall then act as sole arbitrator to determine all such matters as to which the said Sidney O. Raphael and David Morgulas cannot agree, and the decision of said third party shall be final and conclusive. This provision shall be deemed to supplant and/or modify any provision of this agreement, whether printed or typewritten, which shall in any manner be inconsistent therewith.

"Pending the adjustment of any disputes or differences and the determination thereof either by adjustment or award or otherwise, the job program shall not be delayed, but all work shall continue pending the determination of such dispute as aforementioned."

2. Metro alleged they had fully performed, but claimed (a) they had incurred expenses in excess of $200,000, due to Frouge's *delay* in providing the number of units Metro had to paint, and (b) they were compelled to do certain *extra* painting work, i.e., in addition to that called for by the subcontract. Frouge refused to arbitrate Metro's claims. Metro then moved to compel arbitration under Sec. 4, 9 U.S.C. (U.S.A.A.) Frouge cross-moved to stay arbitration and to dismiss the petition for arbitration on the grounds that the Court lacked jurisdiction because (i) the petition neither alleged nor did the subcontract "evidence a transaction involving commerce", as defined in 9 U.S.C., Sec. 1 and as required by 9 U.S.C., Sec. 2; (ii) the requisite diversity was lacking under 28 U.S.C., Sec. 1332(c) as amended, since Frouge's "principal place of business" was in New York, and not Connecticut; and (iii) the issues and disputes relating to alleged *delays* of Frouge, or alleged *"extras"* performed by Metro were not arbitrable or proper subjects of arbitration.

3. Judge Dawson granted Metro's petition to compel arbitration, and denied Frouge's cross-motion holding (i) that Metro had established that Frouge's "principal place of business" within the meaning of 28 U.S.C. Sec. 1332(c), was in Connecticut and not in New York; (ii) that the shipment of men, materials and supervisory personnel from New York to Florida "constituted the performance of a contract evidencing a transaction involving commerce just as does the shipment of goods under a contract of sale from one state to another", citing *Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F. (2) 402 (2d Cir. 1959), cert., granted, 362 U. S. 909, cert. dismissed pursuant to stipulation, 364 U. S. 801 (1960) in support of this proposition; (ii) that since jurisdiction over both subject matter and parties was established, all questions relating to validity, enforcement and interpretation are governed by "federal" rather than "local" law; (iv) that the USAA was to be given a liberal interpretation; (v) that there was nothing to indicate that the issues did not fall within the broad categories set out in the arbitration clause; (vi) that there was no merit in Frouge's contention that the disputes over alleged delays and extras were not arbitrable since "local law" on this issue is "obvious no longer controlling" (again citing *Lawrence Co., supra,* in support of that proposition).

4. The Second Court of Appeals (287 F. (2) 382) affirmed Judge Dawson on all of his above-noted rulings.

On appeal, Frouge urged, (i) that even assuming commerce and diversity existed, the USAA, under the doctrine of *Bernhardt* v. *Polygraphic Company of America, Inc.* (1956), 350 U. S. 198, could not be applied in diversity cases; (ii) that, even if the USAA did apply, local law (i.e., New York or Florida) not federal "substantive" law (as was pronounced by the same Court in *Lawrence, supra*), must be applied on the sole issue in the case, viz., *arbitrability* of the disputes; (iii) that *Lawrence* was not

applicable in this case since it was decided in *Lawrence* that the charge of *fraud* which attacked the *validity* of the arbitration agreement, is itself within the scope of the agreement and does not nullify it; whereas in the case at bar, there was no challenge to the *validity* of the arbitration agreement, which was conceded—rather, Frouge contended only that it was the *arbitrability* of the alleged disputes (i.e., as not being within the scope of the arbitration clause) which it challenged; (iv) that, in any event instead of resolving (i.e., by the *Erie*[1]-*York*[2]-*Klaxon*[3]-*Auten* v. *Auten*[4] (New York) analytical sequence) the conflict of laws and choice of law problem presented, in order to ascertain whether New York or Florida law applied to the *substantive issue of arbitrability*, the District Court brushed such analysis aside and relied on the novel doctrine announced in *Lawrence supra* (at 409) that the USAA "creates national substantive law" and that ". . . *Federal law, as derived from the Arbitration Act* . . ." is controlling, and that local law is ". . . obviously no longer controlling . . .."

Reasons For Granting the Writ

1. The Court of Appeals in this case rested on and applied the doctrine it had promulgated in *Lawrence*, 271 F. (2) 402 (2d Cir. 1959). Accordingly, this petition, in practical effect, is addressed as much to the important constitutional questions raised in *Lawrence*, as to those raised in the case at bar. It is noteworthy that the questions presented in *Lawrence* (*cert. granted* 362 U. S. 909), which failed to reach this Court by reason of the dismissal of certiorari pursuant to stipulation (364 U. S. 801), are virtually identical with those presented by this petition.

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[1] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.
[2] *Guaranty Trust Co.* v. *York*, 326 U. S. 99.
[3] *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487.
[4] *Auten* v. *Auten*, 308 N. Y. 155.

2. The Court of Appeals, in *Lawrence, supra,** as well as in this case, decided basic questions of federal law which have not been, but should be resolved by this Court.

3. The decision in this case appears in direct conflict with the decisions of the Court of Appeals for the Sixth Circuit in *American Airlines, Inc.* v. *Louisville and Jefferson County Air Board,* 269 F. (2) 811 (1959) and the Ninth Circuit in *Ross* v. *Twentieth Century-Fox Film* Corporation, 236 F. (2) 632 (1956).**

In *Airlines, supra,* the termination or renewal of airport leases at Louisville, Kentucky, between the local Air Board and the airline was in dispute. The leases were held within Section 2 of the U.S.A.A. Arbitration was stipulated under Kentucky law. The Air Board attacked the validity of the arbitration provision on the ground that it was *ultra vires* and beyond its authority to delegate its powers to disputes to arbitrators. While holding (p. 815) that Section 2 of the U.S.A.A. "enacted in exercise of Congress' plenary power over interstate commerce", supersedes Kentucky law rendering future disputes provisions unenforceable, it nevertheless ruled (p. 817) that ". . . on the question as to whether the covenant to sub-

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* In *Lawrence,* the Court of Appeals stated at page 404, that that case involved "questions left open by the Supreme Court in *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 1956, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199, and these questions are interesting and important. The basic inquiry must be whether the validity and interpretation of the arbitration clause of the contract in this case is governed by Federal law, i.e., the Federal Arbitration Act, or by local law."

** Likewise, on the issue of the "separability" of an arbitration clause from the "container", or principal agreement in which it may be found, the First Circuit, in *Lummus Co.* v. *Commonwealth Oil Ref. Co.* (1960), 280 F. (2) 915 (footnote 9, p. 924) disagreed with *Lawrence, supra,* and stated ". . . We question whether separability is a matter of federal rather than state law in a diversity case whether or not the federal arbitration act applies for other purposes. . . ."

mit to arbitration was *ultra vires* the Air Board's authority, *State and not federal law governs. . . .*" (Emphasis supplied.)

At page 816, the Sixth Circuit observed that ". . . Federal power to pre-empt, in commerce cases (under Section 2 of the U.S.A.A.), being clear, it remains to inquire just how much of the field the Congress intended to and did occupy . . ."; that Congress intended by the Act merely to overcome judicial hostility to arbitration due to ouster of jurisdiction; that as to Section 2 contracts, invalid, revocable or unenforceable under State or Federal law for other reasons, e.g., fraud, lack of consideration, etc., ". . . there appears no indication whatever of Congressional intent that such agreements would be made valid, irrevocable and enforceable *solely by virtue of the Federal arbitration statute. . . .*" (Emphasis supplied.)

4. *Ross, supra* (which was specifically rejected in *Lawrence*, 271 F. (2) 409, note 7) was not noticed in either Judge Moore's or Chief Judge Lumbard's opinion in this case. In Ross, a contract for the purchase of motion picture rights to a film, and for world-wide distribution was held to be, under Section 2, a "contract evidencing a transaction involving commerce", and subject to the power of the Court, under Section 3, to stay the action pending arbitration. But, more important, the Ninth Circuit held (p. 634) that it was ". . . a correct analysis supported by . . .", *Bernhardt* that the interpretation of the contract was a matter of California law, and it *must be determined by reference to that law*, whether the contract contains language which amounts to a provision for arbitration. The Court then examined the contract and *the law of California*, to determine whether the contract presented an enforceable agreement to arbitrate.

5. In view of the sharp conflict between the circuits on this central issue of Federal law arising from the novel

approach of the Second Circuit, both in *Lawrence, supra* and in the decision at bar, it is respectfully submitted that the foregoing questions should be resolved by this Court.

6. The Court, in its opinion per Moore, Cir. J., at page 801, re-affirmed the doctrine it had announced in *Lawrence, supra*, and stated ". . . it had noted in that case that the constitutional problems raised by applying the Act in diversity cases *only became operative if the Act is regarded as procedural in scope* and that since Congress, drawing upon its commerce powers, created in Section 2 of the Act *a rule of substantive law* declaring certain arbitration agreements valid, irrevocable and enforceable, the Act could *constitutionally be applied in diversity cases* when the requisite commerce elements are present . . .;" that ". . . *Devonshire* held that federal rather than local law governs *'questions of interpretation and construction* as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce . . . since these two types of legal questions are inextricably intertwined', 271 F. (2) 402 at 409"; that the Court below was "correct in *not considering States cases* as binding authority and in determining the issue according to the 'liberal policy' recognized in *Devonshire.*" (emphasis supplied).

7. Chief Judge Lumbard recognized (p. 802) that "This case once again raises the difficult issues recently considered by this Court" in *Lawrence, supra.* While concurring fully, the Chief Judge stated his reasons separately ". . . since one of the issues involves the significant question as to the scope of federal law and its effect on state courts."

8. The importance of the decision in this case is self-evident. It profoundly affects not only the construction industry (which is believed to be the country's largest), and in which arbitration clauses are universally embodied

in the innumerable written agreements between owners and general contractors (as well as between contractors and their sub-contractors), but will have a far-reaching effect as well on the whole rapidly developing field *of commercial arbitration law* generally.* The novel principle propounded in *Lawrence, supra* (on which the decision rests), has unexplored constitutional consequences which unless clarified and resolved by this Court, may soon create confusion among federal as well as state courts as to the extent and scope, under the Supremacy Clause, of the pre-emption, by the U.S.A.A. and its accompanying federal decisional law, of the area of common law, state-created, rights and obligations respecting the interpretation and construction of commercial arbitration clauses and agreements and the pertinent substantive, *state* decisional law on this subject.

Chief Judge Lumbard, at page 804 of his concurring opinion, stated that "Irrespective of State court decisions regarding the construction of arbitration clauses, all such clauses in contracts coming within the scope of the act must be interpreted in the light of federal decisional law." We can urge no more forceful reason for granting the writ herein than that stated by Judge Lumbard in the passage immediately following the one above quoted: ". . . It is most important, therefore, to define precisely what the limits of the federal law are since state courts will

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* It is submitted that the policy considerations underlying the decision of this Court in *Textile Workers Union* v. *Lincoln Mills* (1957), 353 U. S. 448 (that Section 301 of the Labor Management Relations Act of 1947 is not merely jurisdictional but authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements, including arbitration provisions contained therein) are wholly inapplicable to problems arising out of *commercial arbitration*, or to the constitutional issues or questions of statutory construction presented in this petition relating to the United States Arbitration Act.

in all probability, turn to federal decisions to learn when it is that local law must give way under the Supremacy Clause of the Federal Constitution . . ."

9. However, the preliminary question (and the core of the problem), which requires clarification by this Court is *the Congressional purpose* in enacting the U.S.A.A. and the essential nature and applicability of that Statute, in its relation to commercial contracts containing arbitration clauses, involving interstate commerce, as a *strictly procedural state* affecting the law of remedies, or one which directly enacted or by necessary implication from its provisions, empowers the federal courts to create a whole new body of federal substantive law relating to the construction and interpretation of arbitration clauses, to the complete (or partial) exclusion of state-created substantive law. Normally, before arbitration is allowed by a Court, it must determine whether a dispute is "arbitrable" under the pertinent arbitration clause. Hitherto, this called, of course, for the application of state-created rules of construction and interpretation. If, however, the U.S.A.A. is regarded as a statute which pre-empts the field of arbitration law affecting diversity-commerce cases, it is respectfully suggested that this Court must then determine how much of this field Congress intended to and did occupy, and what part of it, if any, has been left to state substantive law.

Petitioner respectfully suggests that the decision in this case reached a conclusion based on reasoning seemingly contrary to the policy which this Court, in *Bernhardt, supra*, at page 203, pronounced as dispositive in such situations:

"If the Federal Court allows arbitration where the State Court would disallow it, the outcome of litigation might

depend on the Courthouse where a suit is brought."* The contract in Bernhardt did not "evidence a transaction involving commerce" within the meaning of the U.S.A.A., but Mr. Justice Douglas (p. 202) decided that Sections 1, 2 and 3 of the U.S.A.A. are integral parts of a whole, and that the stay of arbitration provided in Section 3 reaches only those contracts covered by Sections 1 and 2 and read Section 3 narrowly so as to avoid the constitutional issue which would have arisen under *Erie* v. *Tompkins*, 304 U. S. 62,** as to "whether arbitration touched on substantive rights, which *Erie* held were governed by local law, or was a mere form of procedure within the power of the federal courts or Congress to prescribe." Mr. Justice Frankfurter concurring (p. 208), agreed that ". . . in view of the ground taken in that case (*Erie*) for its decision it would raise a serious question of constitutional law whether Congress could subject to arbitration litigation in the federal courts which is there solely because it is (between citizens of different states), U. S. Const., Art. 3, Sec. 2, in disregard of the law of the State in which the federal court is sitting. Since the United States Arbitration Act of 1925 does not obviously apply to diversity cases, in the light of its terms and the relevant interpretative materials, avoidance of the constitutional question is for me sufficiently compelling to lead to a con-

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* The Circuit Court itself, in *Lawrence, supra*, at page 412, acknowledged this dilemma when it declared: ". . . We note that were we compelled to apply New York law to the problems involved in this case, we would have been forced to arrive at a contrary conclusion."

** As this Court indicated in *Byrd* v. *Blue Ridge Cooperative* (1958) (356 U. S. 525), the cases following *Erie* have broadened the doctrine of that case so that (p. 536) ". . . federal Courts should conform as near as may be—in the absence of other considerations—to State rules even of form and mode, where the State Rules may bear substantially on the question whether the litigation would come out one way in the Federal Court and another way in the State Court, *if the Federal Court failed to apply a particular local rule . . .*" (emphasis supplied).

struction of the Act as not applicable to diversity cases. Of course, this implies no opinion on the constitutional question that would be presented were Congress specifically to make the Arbitration Act applicable in such cases. Furthermore, because the Act is not here applicable, I abstain from any consideration of the scope of its provisions in cases which are in federal courts on a jurisdictional basis other than diversity of citizenship . . ."

The Circuit Court in *Lawrence, supra,* page 404, expressly disagreed with Mr. Justice Frankfurter on the ground that ". . . we find a reasonably clear legislative intent to create a new body of substantive law relative to arbitration agreements affecting commerce or maritime transactions . . ."

Petitioners submit that Section 2 of U.S.A.A., stating that arbitration agreements relating to commerce, etc., shall be "valid, irrevocable and enforceable", actually means only that such agreements previously held *invalid, revocable and unenforceable* shall, by virtue of the U.S.A.A., become the opposite. Such a statutory declaration points to and contemplates establishing the *validity and enforceability* of these agreements solely in the *procedural sense* of guaranteeing their *dependability in law* and thus their *viability* in the industrial and commercial life of the country.

Nothing is explicitly stated in the U.S.A.A. as to the substantive, *contractual basis* or content, criteria or rules of contract *substantive* law or any other area of substantive law, which would measure rights and liabilities of parties to any contract. No rules of construction and interpretation as to the scope of any arbitration provision, or as to the "arbitrability" of any disputes under such provisions, are set forth in the U.S.A.A. It is petitioners' submission that all these derive from and must remain subject to state-created, common law or state-based statutory rights, and that there does not, nor can there exist in the absence of an *express federal substantive statutory*

provision added to the U.S.A.A., any "federal substantive" arbitration law. Even federal decisional law in arbitration cases must ultimately be based (in the absence of provisions in the U.S.A.A. enacting federal substantive law), on *state-created rights and obligations*, governing questions of contract substantive law raised in litigation involving an arbitration clause in commercial contracts.

10. If therefore, as was stated by Judge Moore at page 801 of the opinion (in reaffirming *Lawrence*), ". . . the constitutional problems raised by applying the Act in diversity cases only become operative if the Act is regarded as procedural in scope . . .", then it is this petitioner's respectful submission that the legislative history* of the U.S.A.A., indicates (i) that the Act and the institution of arbitration itself does not create federal substantive rights, but provides *only a means or a method* and a federal forum for adjudicating the rights involved in the parties' underlying dispute and does no more than *regulate the manner* in which federal courts are to enforce rights rooted outside the Act; (ii) that the Act has as its primary purpose the specific enforcement of arbitration provisions; (iii) that Section 2 of the Act (governing cases in commerce) did not create, nor is it the source of, federal substantive rights, has no independent force and does not stand on its own footing apart from the other sections of the Act (*Bernhardt, supra*, p. 201) but merely defines the category of cases to which the Act's later sections (establishing a remedy previously disfavored by the federal courts), are meant to apply; (iv) that Section 2 cases are not insulated from the "outcome-determinative" thrust of *Erie*, and, therefore, (v) the Act must yield to state law in all diversity cases, since arbitration is merely *one means* of

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* *H.R. Rep. No. 96, 68th Cong. 1st Sess. 1 (1924)* ("Whether an agreement for arbitration shall be enforced or not *is a question of procedure . . . The remedy* . . . is founded upon the Federal control over interstate commerce and over admiralty".) (Emphasis supplied).

enforcing state-granted rights in the underlying transaction evidenced by a contract containing an arbitration clause and (vi) that to construe Section 2 as the source of federal substantive rights might bind state courts in a manner not anticipated by Congress.*

11. With great deference, petitioners beg leave to point to the observations in Chief Judge Lumbard's opinion (p. 806) which seemingly indicate that the Court itself believes that Congress, in enacting the U.S.A.A., was not ". . . seeking to regulate and control activity affecting commerce . . .", but was merely providing those engaged in commerce with a convenient *vehicle* or *method* in the federal forum, i.e., ". . . an expeditious extra-judicial *process* for settling disputes . . . ." (Emphasis supplied.)

If this statement is taken to mean that the Court has concluded, therefore, that the U.S.A.A. is predominantly a procedural and remedial statute it is difficult to reconcile such an interpretation of Congressional purpose with that which it announced in *Lawrence, supra.***

Chief Judge Lumbard's further comment (p. 806) that the purpose of the Act was, in substance, to ". . . assure

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* The legislative history of the Act fails to mention the possibility that it might be held applicable to state court actions, but contemporary commentators stated that it was not designed to do so. (See *Cohn & Dayton* in the *New Federal Arbitration Law,* 12 Va. L. Rev. 265, 277 (1926)). See also Note, 69 Yale Law Journal 847 (April 1960), "Erie, Bernhardt and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies and a Right to a Remedy", at pp. 863, 865.

** Petitioners are aware of the "less than self-defining" and "delusive" character of the "procedure-substance" dichotomy (*Bernhardt, supra,* p. 208) but submit that ". . . The terms are still useful and when the thing sought to be determined is analyzed in the light of the goal of achieving substantial uniformity in decision in a State Court and a federal court sitting within that State *concerning a State-created right, they can be decisive . . .*" (*Monarch Insurance Co. of Ohio* v. *Spach* (1960) (5 C. A.), 281 F. (2) 401, 405.

those who desired arbitration and whose contracts related to commerce that their expectations would not be undermined by federal judges, or since the clarification in *Lawrence*, by state courts or legislatures . . .", would also seem to confirm the impression that the Court regards the U.S.A.A. as procedural and remedial in purpose.

Further, the Chief Judge regarded as the "significant question", whether the parties "*contemplated* substantial interstate activity", and went on to place the decision of the Court on that basis, namely, that the parties (p. 807) ". . . anticipated substantial interstate traffic . . ."

It is petitioners' respectful submission, to the contrary, that the issue before the Court, *as to the intentions of the parties,* was what they contemplated or intended as *the applicable law* (New York or Florida) in connection with interpreting the "arbitrability", under the arbitration clause, of the disputes which had arisen (*Lauritzen* v. *Larsen* (1953), 345 U. S. 571). Moreover, it is not clear (see footnote 3, p. 807) whether the Chief Judge affirmatively determined that Florida or New York law was the applicable law on the question of the "arbitrability" of the disputes in question. While seemingly New York law was favored as governing, it is difficult to determine from this marginal note whether on the other hand, Florida law, was *positively rejected* as not applicable. (*Meredith* v. *Winter Haven* (1943), 320 U. S. 228, 233, 234.)

12. Decisional law supports the view that the Act is basically a *procedural and remedial statute,* and that arbitration is part of the law of remedies. *Berkowitz* v. *Arbib & Houlberg Inc.* (1921), 230 N. Y. 261, 269-70 (construing the constitutionality of the New York Act, on which the U.S.A.A. is patterned.)* *Matter of Gantt* (1948), 297

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* In the present New York Act, Section 1450 (New York Civil Practice Act), the specific enforcement section is entitled "Remedy in case of default."

N. Y. 433 and *U. S. Asphalt Ref. Co.* v. *Trinadad Lake Petr. Co.*, 222 Fed. 1006, 1011 (S.D.N.Y. 1915); *Meacham* v. *Jamestown F. & C.R.R.* (1914), 211 N. Y. 346; *Red Cross Line* v. *Atlantic Fruit Co.* (1924), 264 U. S. 109, 123; *Albatross S. S. Co.* v. *Manning Bros. Inc.*, 95 F. Supp. 459 (S.D.N.Y. 1951).

13. Finally, a closely connected, subsidiary question relating to the conflicting interpretations as between the Second Circuit in the decision at bar and other Circuits, as hereinafter indicated, of the phrase "principal place of business", as used in Section 1332(c) Judiciary Act, 28 U.S.C. to determine diversity jurisdiction, should likewise be resolved by this Court. That sub-section reads: "(c) For the purpose of this section and section 1441 of this title a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." The Circuit Court in this case held that there was sufficient evidence to support the finding below that Frouge's principal place of business was Connecticut not New York. The Court evidently followed the "nerve center" or "center of gravity" test adopted in the Second Circuit, i.e., that "the place which actually functions as the nerve center of the enterprise radiating direction and control over the conduct of the corporate business as a whole", is the corporation's principal place of business. (*Scot Typewriter Co. Inc.* v. *Underwood Corp.* (1959), 170 F. Supp. 862, 865); *Hughes* v. *United Engineers & Constructors, Inc.* (1959), 178 F. Supp. 895, 898; *Wearever Aluminum, Inc.* v. *Sipas* (1960), 184 F. Supp. 364, 366.)

14. It must be apparent that for such a vast industry as construction with far-flung multi-state operations throughout the nation, a precise delineation of the concept "principal place of business", as used in Section 1332(c), is of paramount importance in connection with the determination of diversity jurisdiction, especially when this question arises in the context of the U.S.A.A.

15. In the Third Circuit a test different from that in the Second Circuit seems to be applied, viz., the "activities" test: In *Kelly* v. *U. S. Steel Corp.* (1960), 284 F. (2) 850, the Third Circuit held that despite the fact that the highest policy-making decisions of that giant corporation were made in New York, it is *Pennsylvania,* where its major manufacturing, mining, transportation and general operations took place and where the Operation Policy Committee sat, that was its "principal place of business." Said the Third Circuit at page 854, ". . . it is the activities rather than the occasional meeting of policy-making Directors which indicate the principal place of business . . ." This test had been applied in the Third Circuit in *Moesser* v. *Crucible Steel Co. of America* (1959), 173 F. Supp. 953; *Potocni* v. *Asco Mining Co. Inc.* (1960), 186 F. Supp. 912.

16. Two further decisions have appeared recently, one in Illinois and the other in Minnesota, interpreting "principal place of business"; one case fixing the place where "direction and control" take place and where executives' offices are located as the "principal place of business" (*Riley* v. *Gulf, Mobile & Ohio Railroad Co.* (1959), 173 F. Supp. 416, 419, D.C.S.D Ill.); and the other, the place "where it carries on its mining operations, and where all its property facilities and its payrolls and personnel are located, rather than its home office in Cleveland where its directors and executive officers are located . . ." (*Mattson* v. *Cuyuna Ore Co.* (1960), 180 F. Supp. 743, D.C.D. Minn.)

17. In order to establish authoritative tests and criteria for determining the "principal place of business", of a corporation, as used in Section 1332(c), 28 U.S.C., especially as this question arises in the context of diversity problems connected with interpretation and application of the U.S.A.A., this Court should likewise resolve the above-noted conflict between the Courts of Appeals.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

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18 East 41st Street,
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APPENDIX

Statutes.

9 U. S. C. 1 (Arbitration Act).

"Sec. 1. 'Maritime transactions' and 'commerce' defined; exceptions to operation of title

'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

9 U. S. C. 2.

"Sec. 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising

out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable,* save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U. S. C. 3.

"Sec. 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

9 U. S. C. 4.

"Sec. 4. Failure to arbitrate under agreement; petition to United States Court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such

application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * *"

28 U. S. C. 1332-(c) (Judiciary Act).

"Sec. 1332. Diversity of citizenship; amount in controversy; costs

* * * * * * *

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

Appendix.

Judgment.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of February, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge,*
HON. THOMAS W. SWAN,
HON. LEONARD P. MOORE,
Circuit Judges.

In the Matter of the Application of METRO INDUSTRIAL PAINTING CORP. and MAX GERBEN, JOAN GERBEN and LEO GERBEN, d/b/a GERBEN CONTRACTING CO.,

Petitioners-Appellees,

v.

TERMINAL CONSTRUCTION CO., INC., and FROUGE CONSTRUCTION CO., INC.,

Respondents-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel *on consideration whereof,* it is now hereby Ordered, Adjudged and Decreed that the judgment of said District Court be and it hereby is Affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 48—October Term, 1960.

(Submitted December 12, 1960 Decided February 16, 1961.)

Docket No. 26178

METRO INDUSTRIAL PAINTING CORP. and MAX GERBEN, JOAN GERBEN and LEO GERBEN, doing business as Gerben Contracting Company,

Petitioners-Appellees,

—against—

TERMINAL CONSTRUCTION CO., INC., and FROUGE CONSTRUCTION CO., INC.,

Respondents-Appellants.

Before:

LUMBARD, *Chief Judge*, and
SWAN and MOORE, *Circuit Judges.*

Appeal from an order by Archie O. Dawson, *Judge*, granting petitioners-appellees' motion to compel arbitration pursuant to Section 4 of the United States Arbitration Act, 9 U. S. C. § 4, and denying respondents-appellants' cross-motion to stay arbitration and to dismiss the petition.

Affirmed.

M. CARL LEVINE, MORGULAS & FOREMAN (David Morgulas and Jerrold Morgulas, of Counsel), New York, N. Y., *for Petitioners-Appellees.*

Appendix.

RAPHAEL, SEABLES, LEVIN & VISCHI (Sidney O. Raphael and Leo M. Drachsler, of Counsel), New York, N. Y., *for Respondents-Appellants.*

MOORE, *Circuit Judge*:

This is an appeal from an order granting petitioners-appellees' motion to compel arbitration pursuant to Section 4 of the United States Arbitration Act, 9 U. S. C. § 4 (the Act), and denying respondents-appellants' cross-motion to stay arbitration and to dismiss the petition.

Prior to May 26, 1958, respondents Frouge Construction Co., Inc. (Frouge), a Connecticut corporation, and Terminal Construction Corp. (Terminal), a New Jersey corporation, both authorized to do business within the State of New York, and both doing business under the joint venture name of Terminal-Frouge, entered into a contract with the United States of America for the construction of a housing project at the Homestead Air Force Base, Homestead, Florida. On May 26, 1958, Terminal-Frouge entered into a subcontract in New York City with petitioners Metro Industrial Planning Corp. (Metro), a New York corporation, and Max Gerben, Joan Gerben and Leo Gerben, a co-partnership doing business under the name of Gerben Contracting Company, all of whose members are citizens and residents of New York. Under this subcontract petitioners were to perform certain painting work at the Homestead construction site. Included in the agreement was the arbitration clause in issue.[1]

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[1] "Anything to the contrary notwithstanding in this agreement, it is understood that any questions with respect to performance, non-performance, default, compliance or non-compliance, whether on behalf of the Contractor or the Subcontractor, shall be determined by Sidney O. Raphael and David Morgulas jointly. In the event

Appendix.

Petitioners alleged that they fully performed all terms and conditions of the agreement but that they were required to incur expenses in excess of $200,000 because of respondents' delay in providing the number of units to be painted and because they were compelled to do certain painting work in addition to that required by the contract. Respondents refused to arbitrate these claims. Petitioners thereupon moved for relief under Section 4 of the Act.

On appeal from the order compelling arbitration, respondents argue that the court below erred in holding (1) that there was diversity of citizenship between petitioners and Frouge; (2) that the contract between the parties "evidenced a transaction involving commerce"; (3) that federal law was controlling on the issue of arbitrability; and (4) that the disputes over delays and extras were arbitrable under the contract.

(1) As the court below correctly recognized, the federal courts do not have jurisdiction under Section 4 of the Act unless there exists, apart from the Act, an independent basis of federal jurisdiction. See *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons, Inc.*, 2 Cir., 1933, 62 F. 2d 1004; *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 2 Cir., 1959, 271 F. 2d 402, *cert. granted*, 362 U. S. 909, *cert. dismissed pursuant to stipulation*, 364 U. S. 801 (1960). Re-

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that the said Sidney O. Raphael and David Morgulas cannot agree as to the aforegoing matters, then and in that event request shall be made of the President of the Bar Association of the City of New York for appointment and/or designation of a third party, who shall then act as sole arbitrator to determine all such matters as to which the said Sidney O. Raphael and David Morgulas cannot agree, and the decision of said third party shall be final and conclusive. This provision shall be deemed to supplant and/or modify any provision of this agreement, whether printed or typewritten, which shall in any manner be inconsistent therewith.

"Pending the adjustment of any disputes or differences and the determination thereof either by adjustment or award or otherwise, the job program shall not be delayed, but all work shall continue pending the determination of such dispute as aforementioned."

spondents contend that the court below erred in finding the requisite diversity of citizenship since petitioners are all New York citizens and respondent Frouge, although a Connecticut corporation, has its principal place of business in New York, and is therefore, by virtue of 28 U. S. C. 1332(c), deemed to be a citizen of New York. We find sufficient evidence, however, to support the finding below that petitioners met their burden of establishing that Frouge's principal place of business was Connecticut and not New York. The affidavits filed by the parties established, *inter alia*, that Frouge owned a two-story building in Connecticut; that clerical, bookkeeping and administrative work was done in Connecticut; and that Frouge's own letterhead referred to the Connecticut building as its "main office."

(2) Respondents correctly assert that diversity of citizenship alone was not enough to empower the court below to compel arbitration under Section 4 of the Act, and that, in addition, the contract in which the arbitration clause is included must be one "evidencing a transaction involving commerce" within the meaning of Sections 1 and 2 of the Act. *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc., supra;* see *Bernhardt* v. *Polygraphic Co. of America,* 350 U. S. 198 (1956). Irrespective of whether Congress intended the coverage of the Act to be as broad as the constitutional dimensions of the commerce power, the facts found by the judge below are sufficient to support a finding that the transaction evidenced by the contract was within the statutory requirements of the Arbitration Act. It is true that the actual painting work was to be done within the confines of one state (Florida). However, as the trial judge correctly found, many other interstate elements were involved in the performance of this contract. For example, twenty per cent of Metro's work force at the Florida site, as well as a substantial number of supervisory personnel, were transported from New York City to Florida; and materials used by Metro's employees were

purchased from other states, as were materials used by other subcontractors, many of whom were also from out of state. The transaction evidenced by the contract thus clearly involved commerce. See *International Bhd. of Elec. Workers* v. *N. L. R. B.*, 341 U. S. 694, 699 (1951); *Del E. Webb Const. Co.* v. *N. L. R. B.*, 8 Cir., 1952, 196 F. 2d 841, 843.

(3) Respondents next argue (a) that the Act does not apply because, according to *Bernhardt, supra,* it can never be applied in diversity cases, and (b) that even if the Act does apply, local law is controlling on the issue of arbitrability. Both of these contentions flow from respondents' apparent misunderstanding of our decision in *Robert T. Lawrence* v. *Devonshire Fabrics, Inc., supra.* In that case this court noted that the constitutional problems raised by applying the Act in diversity cases only become operative if the Act is regard as procedural in scope, and that since Congress, drawing upon its commerce powers, created in Section 2 of the Act a rule of substantive law declaring certain arbitration agreements "valid, irrevocable and enforceable," the Act could constitutionally be applied in diversity cases when the requisite commerce elements are present. Moreover, contrary to respondents' contention, *Devonshire* held that federal rather than local law governs "questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce • • • since these two types of legal questions are inextricably intertwined" 271 F. 2d 402 at 409. The issue of arbitrability, i.e., whether a particular dispute is covered by an arbitration clause, being a question of "interpretation and construction," the court below was correct in not considering state cases as being binding authority, and in determining the issue according to the "liberal" policy recognized in *Devonshire.*

(4) Finally, we find no error in the trial court's conclusion that the disputes are appropriate for arbitration under the contract. The arbitration clause therein requires the parties to submit "any question with respect to performance, non-performance, default, compliance or non-compliance, whether on behalf of the Contractor or Subcontractor" to arbitration. The grievance asserted by petitioners is that respondents failed to meet time schedules, insisted upon performance of duties not required of petitioners under the contract and failed to supply materials for petitioners. In view of the federal policy to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration (see *Devonshire, supra,* at 410; *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.,* 293 U. S. 449, 453 (1934)), it is clear that these disputes can reasonably be said to fall within the category of compliance or non-compliance.

Affirmed.

LUMBARD, *Chief Judge* (Concurring):

This case once again raises the difficult issues recently considered by this court in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.,* 271 F. 2d 402 (2d Cir. 1959), *cert. granted,* 362 U. S. 909, *cert. dismissed pursuant to stipulation,* 364 U. S. 801 (1960). I concur fully in the disposition which the majority makes of this case, but state my reasons separately since one of the issues involves the significant question as to the scope of federal law and its effect on state courts.

We decided in the *Lawrence* case that the Arbitration Act passed in 1925 by a Congress which had no reason to foresee the decisions of the Supreme Court in *Erie R.R.* v. *Tompkins,* 304 U. S. 64 (1938), and *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198 (1956), involved an exercise not

only of the constitutional power to control procedures in the federal courts but also of the authority constitutionally delegated to Congress to regulate interstate commerce and maritime transactions. This decision was not prompted merely by a desire to salvage the Arbitration Act so that it might apply in diversity cases when the *Erie* doctrine would usually compel recourse to state law; it was based on a conclusion regarding the intent of Congress as culled from the legislative history of the Arbitration Act. The report submitted by the committee of the House of Representatives which drew up the law expressly found authority for its enactment in the power over federal-court procedures granted to Congress by Article III, § 1 of the Constitution and the substantive powers of Article I, § 8 (interstate commerce) and Article III, § 2 (admiralty).[1] Since the Act could not stand after the Supreme Court decision in *Bernhardt* v. *Polygraphic Co., supra,* as an exercise of the power to control procedures in the federal courts, the alternative basis of legislative authority became the sole ground for invoking the Act in diversity cases. If it is an exercise of the commerce and admiralty powers, the Act must apply not only to litigation in the federal courts but to suits in state courts as well.

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[1] The House report contained the following language:

> "The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States. The remedy is founded also upon the Federal control over interstate commerce and over admiralty. The control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce."
>
> H. R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924).

We further held, in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc., supra,* that § 2 of the Arbitration Act did not merely render arbitration clauses in interstate commerce and admiralty contracts valid, irrevocable, and enforceable in federal and state courts regardless of state law, but that it also empowered the courts to develop a substantive body of federal law with regard to the interpretation and construction of such clauses. Irrespective of state court decisions regarding the construction of arbitration clauses, all such clauses in contracts coming within the scope of the act must be interpreted in the light of federal decisional law.

It is most important, therefore, to define precisely what the limits of the federal law are, since state courts will, in all probability, turn to federal decisions to learn when it is that local law must give way under the Supremacy Clause of the Federal Constitution.

Section 2 of the Arbitration Act specifies that it should apply to any written provision in "any maritime transaction" or in "a contract evidencing a transaction involving commerce." The issue in this case is whether, on the facts before us, the contract to paint buildings in Florida was one "evidencing a transaction involving commerce."

Notwithstanding the finding in *Lawrence* that "Congress intended to use to the fullest possible extent its powers to regulate commerce as it was affected by arbitration agreements," the legislative history of the Arbitration Act of 1925 reveals little awareness on the part of Congress that state law might be affected. See Note, 69 Yale L. J. 847, 863 (1960). Having no clear mandate from Congress as to the extent to which state statutes and decisions are to be superseded, we must be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states. It may be a close constitutional question indeed whether Congress could regulate arbitration provisions in all contracts "affecting commerce" or between persons "engaged

in commerce'' as these phrases have been defined by countless cases under the National Labor Relations Act, § 10(a), 29 U. S. C. § 160(a), or the Fair Labor Standards Act, §§ 6(a), 7(a), 29 U. S. C. §§ 206(a), 297(a). See *e.g. Mitchell* v. *H. B. Zachry Co.*, 362 U. S. 310 (1960), and cases there cited. The majority in this case does not suggest that the Arbitration Act be read so broadly. Judge Moore finds, however, that the quantity of interstate commerce actually engaged in was sufficient to bring the contract before us within the area which Congress wished to affect. I agree, but my conclusion is based not on what in fact happened, but on what was in the contemplation of the parties as manifested in their written agreement.

The language of § 2 of the Arbitration Act might suggest that the test to be applied is a formalistic one. The statute does not purport to affect arbitration provisions in all contracts involving commerce; it puts its stamp only on such provisions when incorporated in contracts *evidencing a transaction* involving commerce. Were it not for the broad remedial purpose of the statute and for contrary indications in the legislative history,[2] we might be justified in limiting the effect of the act to only those contracts which, on their face, reveal that some interstate transaction is to take place. In view of the decision in the *Lawrence* case, the advantage of such a rule would be that it would restrict the number of cases in which federal rules concerning the interpretation of arbitration clauses would be imposed upon essentially local transactions.

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[2] It appears that the language reading "evidencing a transaction involving" was added to the bill without explanation by a Senate committee, S. Rep. No. 536, 68th Cong., 1st Sess. 1 (1924). The bill had previously read, "in any maritime transaction or contract or transaction involving commerce." The committee's intent was apparently to improve the language of the act and not to effect a substantive change.

Even presuming that *Erie* and *Bernhardt* could have been anticipated, however, it is unlikely that Congress would have wished so to limit the effect of the act. Contracts of parties unaware of the judicially pronounced rule might then fall outside the scope of the act although the activity demanded by these contracts might involve substantial interstate traffic. The rule of construction should be based on some more realistic appraisal of the ends Congress wished to serve.

In enacting the Arbitration Act, unlike various other statutes invoking the interstate commerce power, Congress was not seeking to regulate and control activity affecting commerce, but was providing for those engaged in interstate transactions an expeditious extra-judicial process for settling disputes. The Arbitration Act may be avoided entirely by those engaged in interstate traffic if they merely refrain from including any arbitration provisions in their contracts. The Congressional intent was not, therefore, to impose an adjudicative system on those who wished none nor was the intent to affect all contracts possessing certain interstate elements; the purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges or, since the clarification in *Lawrence,* by state courts or legislatures. See *American Airlines, Inc.* v. *Louisville and Jefferson County Air Board,* 269 F. 2d 811 (6th Cir. 1959).

The significant question, therefore, is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, and if it, on its face, evidences interstate traffic, such as did the shipment from New York to Massachusetts in the *Lawrence* case, the contract should come within § 2.

In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated.

In this case, at the very top of the written contract between the parties was the following designation:

Name of Job

Armed Services Housing Project
Homestead Air Force Base
Homestead, Florida

The body of the contract named one of the subcontractors as "Metro Industrial Painting Corp. of 404 Exterior Street, Borough of Manhattan, New York, New York." When taken together with the uncontradicted statement in the affidavit submitted by the President of the Metro Corporation that at least 20% of the men working on the project were transported from New York to Florida and that the main supervisory forces were from New York, it appears reasonably clear that the parties anticipated substantial interstate traffic. The trips made by supervisors must have been foreseen, as well as the interstate transportation of some of the working force to Florida. The contract was, therefore, one "evidencing a transaction involving commerce," it came within § 2 of the Arbitration Act, and federal law controlled construction of the arbitration clause.[3]

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[3] Even if the contract were not held to be one "evidencing a transaction involving commerce," the reference to arbitration would still be proper under New York Civil Practice Act § 1450. Although arbitration is held procedural for *Erie* purposes, *Klaxon Co.* v. *Stantor Elec. Mfg. Co.*, 313 U. S. 487 (1941), requires us to look to the New York rule on conflict of laws in deciding whether to apply New York or Florida law to the arbitration clause of the contract. New York might under *Auten* v. *Auten*, 308 N. Y. 155 (1954), apply Florida law in interpreting various provisions of the contract before us. But whether a dispute comes within an arbitra-

Appendix.

The fact that it is necessary for one party to cross state lines in order to fulfill obligations arising out of the contract should not by itself bring the arbitration clause within the reach of the federal statute. See *Conley* v. *San Carlo Opera Co.*, 163 F. 2d 310 (2d Cir. 1947), *affirming* 72 F. Supp. 825 (S. D. N. Y. 1946). The Arbitration Act should apply only when the parties know or have reason to believe that the performance of the contract will require substantial interstate movement. *Cf. Tejas Development Co.* v. *McGough Bros.*, 165 F. 2d 276 (5th Cir. 1947).

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tion clause would, under New York conflicts law, relate to the "law of remedies," and the question would be governed by the law of the forum. See *Matter of Gantt*, 297 N. Y. 433, 79 N. E. 2d 815 (1948). The *Gantt* case indicates that arbitration is considered by the New York courts as merely an alternative method of deciding facts, and the reference to arbitration is, therefore, procedural for conflict-of-laws purposes. The clause in this case, under New York decisions, would clearly cover the dispute with regard to delays in performance. See *In re Iino Shipbuilding & Engineering Co.*, 6 A. D. 2d 159, 175 N. Y. S. 2d 750 (1958); *Application of Potter*, 149 N. Y. S. 2d 641 (Sup. Ct. 1956), *aff'd*, 155 N. Y. S. 2d 775; *Straight Line Foundry & Mach. Corp.* v. *Woirich*, 204 N. Y. S. 2d 29 (Sup. Ct. 1959); *Fabrex Corp.* v. *Winard Sales Co.*, 200 N. Y. S. 2d 278 (Sup. Ct. 1950).

SUPREME COURT U. S.

FILED
JUL 29 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 88

TERMINAL CONSTRUCTION CO., INC. and
FROUGE CONSTRUCTION CO., INC.,

Petitioners,

—against—

METRO INDUSTRIAL PAINTING CORP. and MAX GERBEN, JOAN GERBEN and LEO GERBEN, doing business as GERBEN CONTRACTING COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID MORGULAS
Attorney for Respondents

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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

TERMINAL CONSTRUCTION CO., INC. and
FROUGE CONSTRUCTION CO., INC.,

Petitioners,

—against—

METRO INDUSTRIAL PAINTING CORP. and MAX GERBEN, JOAN GERBEN and LEO GERBEN, doing business as GERBEN CONTRACTING COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York (Dawson, J.) is reported at 181 Fed. Supp. 130 and is printed in the Record to be found in the Appendix of the Petition herein at pgs. 35a-42a. The opinion of the Court of Appeals for the Second Circuit is reported at 287 F. 2d 382 and is printed in the Appendix to the Petition herein at pgs. 25-35.

Jurisdiction

The jurisdiction of this Court has been invoked by Petitioners under 28 USC Sec. 1254(1). The judgment of the Court of Appeals for the Second Circuit was entered on February 16, 1961.

Statement of the Case

This petition arises out of the following facts: Sometime prior to May 26, 1958, Terminal Construction Co., Inc., a New Jersey corporation, and Frouge Construction Co., Inc., a Connecticut corporation, both then doing business as a Joint Venture are hereafter referred to as Terminal-Frouge, entered into an agreement with the United States of America for the construction of a Capehart Act Military housing project at the Homestead Air Force Base, located at Homestead, Florida. On May 26, 1958, Metro Industrial Painting Corp., a New York Corporation, and Gerben Contracting Company, a partnership consisting entirely of New York State citizens also acting as a Joint Venture (and hereafter referred to as Metro) entered into a subcontract with Terminal-Frouge for certain painting work to be done at the aforementioned Capehart project. For convenience the Metro-Gerben Joint Venture will hereinafter be referred to as Metro. This subcontract was executed by all parties in the office of counsel for Terminal-Frouge in New York City, New York. The subcontract contained the following arbitration provisions:

> "Anything to the contrary notwithstanding in this agreement it is understood that any questions

with respect to performance, non-performance, default, compliance, or non-compliance, whether on behalf of the Contractor or the Subcontractor, shall be determined by Sidney O. Raphael and David Morgulas jointly. In the event that the said Sidney O. Raphael and David Morgulas cannot agree as to the aforegoing matters, then and in that event request shall be made of the President of the Bar Association of the City of New York for appointment and or designation of a third party, who shall then act as sole arbitrator to determine all such matters as to which the said Sidney O. Raphael and David Morgulas cannot agree, and the decision of said third party shall be final and conclusive. This provision shall be deemed to supplant and or modify any provision of this agreement whether printed or typewritten, which shall in any manner be inconsistent therewith.

"Pending the adjustment of any disputes or differences and the determination thereof either by adjustment or award or otherwise, the job program shall not be delayed, but all work shall continue pending the determination of such dispute as aforementioned."

During the performance of the contract, a number of disputes arose with respect to non-performance, default and failure to comply with contract terms, schedules and specifications. One of the principal matters in dispute was the alleged failure of Terminal-Frouge to have the required number of dwelling units (as provided for by the subcontract) prepared in advance for Metro's painting work so that such work might proceed according to schedule and economically.

all of which caused Metro to incur extremely high additional costs. Other disputes related to (a) failure of Terminal-Frouge to abide by contract specifications in that they required work which was clearly not called for under the subcontract, (b) to Terminal-Frouge's failure to provide properly prepared surfaces to receive Metro's painting work, (c) to Terminal-Frouge's failure to properly erect certain walls thereby necessitating considerable repainting, and to numerous other matters of this general sort. These claims aggregate the sum of $283,000.00. Furthermore, an unpaid balance in the sum of $13,819.71 on the original contract price is also claimed. Despite repeated demands, Terminal-Frouge refused to arbitrate these disputes and Metro was forced to seek redress pursuant to 9 U.S.C. Section 4. By cross-motion, Terminal Frouge moved to stay the arbitration requested by Metro on the sole ground that the issues referred to in the moving petition were not arbitrable; their contentions as to the lack of a transaction involving "Commerce" within the meaning of 9 U.S.C. Section 1, and lack of diversity jurisdiction under 28 U.S.C. Section 1332(c) were first made on oral argument and appear nowhere in the moving papers nor in their answer to the petition.

The District Court for the Southern District of New York, by Judge Dawson, granted Metro's motion to compel arbitration, holding that the subcontract was clearly a "contract evidencing a transaction involving commerce" within the meaning of the United States Arbitration Act, 9 U.S.C. §4, and that there was nothing to indicate that the specific issues in dispute did not fall within the broad penumbra of the subject arbitration clause, particularly when viewed

according to the policy of liberal interpretation dictated by the United States Arbitration Act. The cross-motion of Terminal-Frouge was denied on the ground that Metro had more than met the burden of proving that Petitioner Frouge's principal place of business was in Connecticut, not New York, within the meaning of 28 U.S. Code, Section 1332 (c), and that Terminal-Frouge had failed to prove that Frouge's principal place of business was actually in New York so as to oust the Court of diversity jurisdiction.

The Second Circuit Court of Appeals (at 287 F. 2d 382) affirmed The District Court on each and every point, finding on the facts presented that (1) The subcontract evidenced a "transaction involving interstate commerce", (2) that, Frouge's principal place of business was in Bridgeport, Connecticut and not in New York and (3) that the arbitration clause in the contract between Metro, on one hand, and Frouge-Terminal on the other clearly comprehended arbitration as to the matters in dispute regardless of whether Federal or New York law was applied. The Court also pointed out that inasmuch as New York considers questions of the scope of arbitration clauses as questions of procedural law, there could be no reference to the law of Florida on any point.

Questions Presented

Petitioners would have it appear that important and broad questions of law are presented by the decision of the Court below. Such a claim on Petitioners' part is, naturally, obligatory since otherwise there would not have been even a pretense for the filing of the petition. The facts of the instant case, however,

render it *sui generis* as to the actual issues involved. The issues which petitioners cite as the "Questions Presented" are not present at all in the instant case, however deftly petitioners may attempt to infer that they are.

In setting forth their "Questions Presented" on page two of the petition herein, Petitioners attempt to create the impression that the District and Circuit courts reached their conclusions herein by rejecting applicable State substantive law in favor of a newly defined Federal "substantive" law. This inference is wholly without foundation.

Petitioners then go on to state at page 7 of the petition that the questions decided here were the same as those involved in *Robert Lawrence Company Inc.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402. This contention is equally without merit, as will be presently shown.

Under point 4 of their "Questions Presented" petitioners raise yet another spurious issue, i.e., whether the U.S. Arbitration Act applies in actions brought in state courts as well as those brought in the Federal Courts. This question was totally absent from the present proceedings. As the instant case was brought initially in the Federal Courts and decided in the Federal Courts, it was wholly irrelevant whether or not the Arbitration Act might be held, in some other situation, to apply in a state court proceeding. The question may some day arise, but it has not arisen in the instant case. In stating this "Question" petitioners have wholly and improperly departed from the actual issues of this case, considered and decided by both Courts below.

What the court below actually held in our case was that 1) the sub-contract evidenced a "transaction involving interstate commerce" within the meaning of 9 U.S.C. 4 (The United States Arbitration Act), 2) that the disputes here involved were within the scope of the arbitration clause contained in the sub-contract and 3) that Petitioners' various attacks on the Court's jurisdiction were wholly without factual basis as Frouge's principal place of business was in Connecticut and not New York.

What Petitioners have attempted to do is to extend the Court's holding with regard to the scope of the subject arbitration clause into a whole-scale restatement of the principles set forth in *Robert Lawrence* v. *Devonshire Fabrics Inc.*, (supra). But the holding in the instant case does not in any way depend on the *Lawrence* case. On the contrary, the "liberal" policy of interpretation of arbitration clauses is a Federal doctrine which goes back as far as *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 453 (1934), and was merely restated by, not originated in *Lawrence* and then only at the end of a long and many faceted decision which dealt with substantive questions which are not present at all in the instant case.

Finally, the question raised by Petitioners under Item 5 of its "Questions Presented" never was raised at all during the course of these proceedings. Petitioners attempted below to argue that the principal place of business of Petitioner Frouge was in New York City on the grounds that certain so-called "executive offices" were located within the city. Metro however conclusively proved that Frouge's main ex-

ecutive offices as well as its operational offices are in fact located in Bridgeport, Connecticut, and both the District and the Circuit Courts so found. The matter was decided solely on the basis of the facts presented rather than on any choice between applicable "tests." Addressing itself to this point, the Circuit Court said:

> "We find sufficient evidence, however, to support the finding below that petitioners met their burden of establishing that Frouge's principal place of business was Connecticut and not New York. The affidavits filed by the parties established, *inter alia,* that Frouge owned a two-story building in Connecticut; that clerical, bookkeeping and administrative work was done in Connecticut; and that *Frouge's own letterhead referred to the Connecticut building as its 'main office.'*" (emphasis added)

With great deference, we respectfully submit that the issue with regard to the principal place of business of Petitioner Frouge was an issue of fact, pure and simple, and is not a subject for review by this Court.

REASONS FOR DENYING APPLICATION FOR WRIT

POINT ONE

The holding in the instant case does not depend on the decision of the 2d Circuit Court of Appeals in *Robert Lawrence* v. *Devonshire Fabrics Inc.*, 271 F2d 402.

Petitioner has attempted to make it appear as though, to use his own words, the "questions presented" in *Lawrence* (supra) are "virtually identical with those presented on this petition" (see p. 7 of the Petition herein), and has thereafter proceeded to frame all of its arguments in terms of the questions which arose under the *Lawrence* case.

Nothing, in fact, could be farther from reality since the holdings in the instant case in no way depend on the holding in *Lawrence*.

The pivotal issue in *Lawrence* was whether or not a claim of fraud in the inducement of the contract containing the arbitration clause was to be passed upon by arbitrators convened under that clause or by the Courts, prior to any arbitration proceedings. Serious questions involving the substantive law of contracts of the State of New York were thus raised. No such questions are present in the instant case.

The only element of *Lawrence* which is even remotely involved here is its restatement of the long accepted principle that a Federal court will liberally

construe an arbitration clause which is properly before it pursuant to the U.S. Arbitration Act. This principle is hardly unique or newly enunciated in the *Lawrence* case. See, e.g., *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, (supra); *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978; *Signal-Stat Corp.* v. *Local 475*, 235 F.2d 298, cert. denied 354 U.S. 911; see also *Wabash Ry.* v. *American Refrigerator Transit Co.*, 7 F.2d 335, 351, cert. denied 270 U.S. 643. This doctrine has, in fact, even been adopted by the New York Court of Appeals, with specific reference to its restatement in *Lawrence*. See *Matter of Grayson-Robinson Stores, Inc.*, 8, N.Y. 2d 133.

In *Lawrence*, the Court held that State law must give way to Federal law on the *substantive* issue of whether the contract containing the arbitration clause is itself valid and enforceable. Under the law of New York this "threshold issue", as it has been called, is a question for the Courts, rather than for the arbitrators and where the Court has found that the contract itself is invalid the disputes can never reach the arbitrators at all. Applying its conception of Federal law, the court in *Lawrence* held that this "threshhold" issue was for the arbitrators, not the court.

But in the instant case there is no question whatever as to the validity of the sub-contract, which is conceded to be valid by Petitioners. Thus the question of "choice of laws," to use Petitioners' phrase, is not here present.

At this point, as the Court of Appeals took great pains to indicate, it is most important to note that the outcome of the instant case is exactly the same regard-

less of what law is applied, for both the relevant Federal law and that of New York dictate the same conclusion; if the law of New York (which is considered Procedural, not substantive), is applied, the disputes are unquestionably within the scope of the instant arbitration clause. See *In re Lino Shipbuilding & Engineering Co.*, 6 A.D. 2d 159 (1958); *Application of Potter*, 149 NYS2d 641, aff'd 155 NYS2d 775; *Straight Line Foundry & Machine Corp.* v. *Wojick*, 204 NYS2d 29; *Fabrex Corp.* v. *Winard Sales Co.*, 200 N.Y.S.2d 278. Nor does reference to New York's law of conflicts alter the outcome as New York regards questions relating to the scope of arbitration clauses to be part of the law of remedies and thus *procedural* rather than substantive, such questions being always subject to the lex fori. See *Matter of Gantt*, 297 NY 433, 79 N.E.2d 815 (1948). The same result would obtain even if the law of Florida were consulted as Florida also regards questions of scope to be procedural and subject to the lex fori. See *Pacific Mills* v. *Hillman Garment*, 87 So. 2d 599, Supreme Court of Florida, Division A, 1956. Thus while the applicable law of New York, if applied, would yield the identical results, the *conflicts law* involved regards such questions as procedural and would in any event remit them to the law of the forum, in this case the interpretive procedural law of the Federal Court, acting under the U.S. Arbitration Act.

It is of extreme importance to note at this point that petitioners have dropped their argument with regard to the basic applicability of the U.S. Arbitration Act and now, by their silence, concede that the requisite interstate commerce element is present. The only question left is that of the law which the Federal

Court should apply *under* the Arbitration Act. Assuming arguendo that Petitioners' contentions are correct and that the Court should have considered itself bound by *Erie* v. *Tompkins*, the District Court would simply look, on remand, to New York law for the disposition of the present issues. But the Circuit Court has already held, by Judge Lumbard, that the *reference to arbitration is proper under New York law* as well (See note 3, page 35 of the Appendix to the petition herein). Thus the only possible result on remand to a District court bound by State law under *Erie* would be an exact duplication of the result already reached, i.e., a referal of the subject disputes to arbitration. It may be noted, parenthetically, that inasmuch as Judge Lumbard sat as a Justice of the Supreme Court of the State of New York (1947) and served on a number of occasions as Special assistant attorney general of that State his holding as to the law of New York is to be given the greatest weight and authority. Cf., *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198.

Thus there is no conflict with state law at all and no question of the result being different if State rather than Federal law is applied. As previously stated (see *Matter of Grayson-Robinson Stores, Inc.* (supra)) the Court of Appeals of New York was specifically adopted the statement of liberal construction made by the Second Circuit in *Lawrence* so that the two are now as perfectly consistent in form as they were before in substance. Hence it is respectfully submitted that on this issue the instant case is wholly *sui generis* and presents no conflict of principles requiring review by this Court.

POINT TWO

The cases cited by petitioner do not deal with the issues here involved and are completely distinguishable.

Petitioner, in support of its arguments vis-a-vis the doctrine of *Lawrence* v. *Devonshire* cites two cases in an effort to show conflict among the circuits.

But both *American Airlines Inc.* v. *Louisville & Jefferson County Air Board*, 269 F2d 811, and *Ross* v. *20th Century Fox Film Corp.*, 236 F2d 632, involved questions of the *initial validity* of the contracts, the so called "thresh-hold" issue to which we previously referred, and therefore involved questions of the *substantive* law of contracts. These cases may well be in conflict with the holding in *Lawrence* on this issue, but they are in no way in conflict with the holding in the instant case as there is no question here concerning the validity of the subject-contract at all or the choice of laws governing such an issue.

As Petitioners themselves point out (p. 9 of the Petition herein) *Ross* dealt only with the question of whether the contract "presented an enforceable agreement to arbitrate." The issue was thus one involving the substantive law of contracts as applied to the so-called "thresh-hold issue". But when the court in *Ross* finally resolved that question and arrived at the issue of the scope of the arbitration clause no reference at all was made to state law and the Court analyzed the issues on their merits as it saw them.

Similarly, *American Airlines* (supra) involved only the issue of initial validity of the underlying contract and that issue alone. There was no question in *American Airlines* as to the scope of the arbitration clause itself.

Thus while there may or may not be conflict between the cited cases and the holding in Lawrence vis-a-vis the choice of laws on the question of initial validity of the contract, there is no conflict at all with the holding in the instant case on the question of scope for the simple reason that the question did not arise in either of the cited cases and the question with which the two cases *were* in fact concerned does not appear at all in the instant case.

POINT THREE

The holding in the instant case is not in conflict with the holding in *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198.

Petitioners have gone to great lengths here, as before, to cloud the actual issues in this case by complex but irrelevant discussions of this Court's decision in *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198 (see pgs 12-14 of the Petition herein). In *Bernhardt* the parties were before the Federal bench solely because they were citizens of different states. There was no interstate commerce element present and, most important, the result of the controversy would have been completely different had state rather than Federal law been applied. This Court then held that where there was no interstate commerce element

present, the U.S. Arbitration Act could not apply. The District Court was therefore to regard itself simply as a court of the state in which it was situated and apply that state's laws to the question of whether or not the arbitration contract before it was a valid and enforceable agreement.

None of those elements are present in the instant case.

Instead, we have here a case which involves a contract evidencing a "transction involving interstate commerce" squarely within the meaning and coverage of the U.S. Arbitration Act. There is no question whatever of the validity of the subcontract in the instant case, as there *was* in Bernhardt. The only question here is whether the specific disputes come within the scope of the arbitration clause. Furthermore, the Court of Appeals here found that the result would be the same regardless of whether Federal or New York law, the only two possible choices, is applied.

In *Bernhardt*, this Court's holding was impelled by the stated fear that in a case before the Court solely as a result of diversity of citizenship, the imposition of Federal rather than State law might alter the result in a manner forbidden by the doctrine of *Erie* v. *Tompkins*, 304 U.S. 64. In the words of this Court, in *Bernhardt*,

> "* * * the larger question presented here * * * is whether arbitration touched on substantive rights which Erie R. Co. v. Tompkins held were governed by local law, or was a mere form of procedure within the power of the Federal Courts or Congress to prescribe * * *" (p. 202).

The invasion by Federal law of areas which should be governed by State law is, of course, a legitimate cause for concern. But it is respectfully submitted that where the particular state *itself* regards the particular question or 'field' of law as one of *procedure* rather than substance Federal action is both proper and permissible. (See *Matter of Gantt,* supra). Certainly if the state regards the question as one involving *"procedural"* law it would be odd indeed for the Federal court to insist that the matter is, on the contrary, one of *substantive* law and force the state to apply its own procedural law when under the conflicts law of the state the matter would be left to the lex fori.

Further, where both the State and Federal law would in any event achieve exactly the same result the question becomes academic in the extreme.

As Judge Lumbard stated (Footnote 3 of his concurring opinion, p. 35 of the Appendix to the Petition herein):

> "Even if the contract were not held to be one 'evidencing a transaction involving commerce' the reference to arbitration would still be proper under New York Civil Procedure Act 1450."

It is respectfully submitted that the instant case is wholly *suit generis* and requires no review by this Court.

POINT FOUR

The question of a corporation's principal place of business under 28 USC 1332(c) is one of fact: there is no decisional conflict regarding criteria to be applied whatever.

Petitioners have attempted to create a further issue as to the "tests" to be used to determine a corporation's principal place of business under 28 USC 1332(c). Petitioners cite a number of decisions in different circuits, each dealing with a wholly different type of corporate enterprise, and then attempt to infer that the criteria which petitioners "think" the Court of Appeals used in this case are in conflict with those used by other circuits.

It is respectfully submitted that there is no substance whatever to these allegations and that the introduction of this issue is a last minute attempt to find a question by which to gain the ear of this Court and nothing more. It is spurious in the extreme.

The question of the locus of a corporations principal place of business is one to be decided on the facts and on the facts alone. See e.g., *Clark Brothers Co.* v. *Portex Oil Co.*, 113 F. 2d 45, 47 (9th Cir. 1940); *Townsend* v. *Bucyrus-Erie Co.*, 144 F. 2d 106 (10th Cir., 1944). This was so under Sec. 11 of the Bankruptcy Act after which the present statute was patterned and is no less so today under 28 U.S.C. 1332(c).

Each type of corporate operation is, in a sense, unique. No two corporations, even within the same industry, operate on the same organizational and

structural pattern, and certainly the factual criteria which may determine the principal place of business of a typewriter company (See *Scot Typewriter Co.* v. *Underwood Corp.*, 170 F. Supp 862) are not the same as may determine the issue where a giant steel company (*Moesser* v. *Crucible Steel Co. of America*, 173 F. Supp 953) or a mining concern (*Mattson* v. *Cuyma Ore Co.*, 180 F. Supp 743) are involved.

Rather than pointing to any real conflict in decisions as regards the meaning of Section 1332(c) when applied to a *construction corporation*, Petitioners seem to complain that the court below failed to state any binding criteria at all. This is in fact so. The District Court and the Court of Appeals simply took the facts as presented and, without recourse to any limiting formula which, once established, would only have to be stretched in procrustean fashion with each new case, decided the issue on the basis of the simple facts here present.

The construction industry presents an operational structure unique and different from that of any other form of corporate enterprise. It is respectfully submitted that in each individual case the Court must examine the facts presented by both parties and then determine, on a strictly factual basis within the framework of the particular industry involved just where the principal place of business of the subject corporation is. There can be no universal test applicable to all corporations of whatever kind, as petitioners would seem to contend. Nor for that matter can there be a set of rules and regulations to be applied to some mythical being known as the "construction industry", for different construction companies operate in different fashions.

The holding of the District court, and the affirmance by the Court of Appeals was predicated wholly on the facts, without any reference to "tests" or particular doctrinal criteria. There is no conflict with any decision of any other circuit and there is no requirement that binding ground rules be established. In the instant case the Court simply said: .

> "We find sufficient evidence, however, to support the finding below that petitioners met their burden of establishing that Frouge's principal place of business was Connecticut and not New York. The affidavits filed by the parties established, *inter alia*, that Frouge owned a two-story building in Connecticut; that clerical, bookkeeping and administrative work was done in Connecticut; *and that Frouge's own letterhead referred to the Connecticut building as its 'main office.'* " (Emphasis added)

It is respectfully submitted that on the question of the Principal Place of Business the facts of this case again render it wholly *sui generis* and that there is no conflict of principles requiring review by this Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari herein be denied.

Respectfully submitted,

DAVID MORGULAS,
Attorney for Respondents.